No. 43807-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL A. LIBERA,

Appellant,

v.

CITY OF PORT ANGELES,

Respondent.

Appeal from Clallam County Superior Court
Judge Kenneth Williams

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In order for Mr. Libera to open his oil recycling business on property he owned within the City of Port Angeles, the City required that water pooling at that site be remedied before Mr. Libera could open his business. But the only remedy for the pooling (the repair and updating of the drainage system), was solely within the ownership and control of the City. As a result, Mr. Libera lost funding for the business, lost the property to foreclosure, and lost other business opportunities because his credit was damaged. If the City had acted legally and complied with state and City laws and regulations in a timely manner, the business would have successfully opened and damages to Mr. Libera would have been avoided.

Mr. Libera filed the instant action in Clallam County Superior Court on October 19, 2011 under several common law theories including tortious interference with business expectancy. The City of Port Angeles filed a motion for summary judgment to dismiss all of Mr. Libera's claims brought against it under CR 56. The motion was granted on all counts on July 13, 2012.

I. RESPONSE TO COUNTERSTATEMENT OF THE CASE

The City would have the Court view the facts in a vacuum, which is the only scenario that could allow them to argue that only a single event

can be the basis for the claims raised by Mr. Libera, to support their theory of the statute of limitations. The Court would have to overlook reality – that it was a chain of events put into motion by the City that caused the damages – not merely one single event of the City's choosing. The caselaw on this point supports the "chain of events" and delay theory as the basis for the harm supporting Mr. Libera's statute of limitations theory. The City expends much effort taking the facts and Mr. Libera's statements out of context. The court should keep in mind that Mr. Libera's claims are against the City of Port Angeles, not against individuals.

In 1984, Mr. Libera first contacted the City regarding drainage problems on the property. At this point, the City was on notice that that an old drainage system caused water pooling at the intersection of Fairmount Avenue and S.R. 101. CP 32. Around this time, Mr. Libera secured the original permits for his future business. On October 3, 1988, Mr. Libera made additional contact with the City regarding the drainage problem and its relationship to the City's paving requirements. CP 35. Mr. Libera received a response from the City on October 21, 1988, pertaining to the paving requirements.

In 1995 and 1996, Mr. Libera worked with Mr. Unger, an engineer, to prepare plans for updating the drainage system. In 2007, after the City

asked for an update, Mr. Unger completed the sitemap. On numerous occasions, Mr. Libera made many requests to the City regarding the installation of a functional drain line to draw water away from the Property and prevent storm system back-up problems, which would then allow him to proceed with paving the parking area of the Property.

Finally on January 22, 2008, Mr. Libera received a response letter from Stephen Sperr, a Civil Engineer with the City. CP 37. This letter informed Mr. Libera of several state stormwater program changes in 2005 since his previous development plan, and that site inspections would be delayed until Mr. Libera's stormwater plan was approved. Once Mr. Libera installed these requirements, the system would then need to connect to the City's system located about 200 feet away in order to function properly and comply with state and local laws and standards. Mr. Libera expected to have his stormwater system functional within a month or two of installing the updated stormwater requirements so he could proceed with development of the Property. In order for his system to be functional, it would need to connect with the City's system, which he had no control over.

On March 6, 2008, Mr. Unger sent a letter with the revised drainage plan and calculations to Mr. Sperr. Around this time, Assistant

Civil Engineer for the City Roger Vess[1] told Mr. Libera to continue with the paving, and that later (potentially 2-3 months) the City would remove the pavement and fix the drainage problem. The paving would have cost approximately $22,000, only to have to be re-paved in a very short time period. This advice was unreasonable and made no practical sense to Mr. Libera or his excavation contractor, Mr. Morrison. Mr. Morrison declined to work on the project primarily because it was his belief that this was a bad plan.

Plaintiff's project continued to be delayed because of the City's acts and omissions. No reputable contractor would complete Plaintiff's paving and portion of the storm drain and connect to the City's segment until the City's segment was unblocked, operational and complied with Urban Services Standards and Guidelines.[2] Mr. Libera offered to replace the archaic piece of the stormwater system with a more modern system at his own expense, but the City, represented by Roger Vess, denied this request. Not only would the City fail to upgrade the system, they also would not allow Mr. Libera to upgrade the system.

On March 27, 2008, Mr. Libera followed the City's advice to move forward and paid Angeles Plumbing $500 to "jet" the sewer line to attempt

[1] Mr. Vess is not a licensed engineer and has no training whatsoever in any kind of engineering. CP 76-79.

[2] See Urban Services Standards, Ch. 2 – Wastewater, CP 41, and Ch. 3 – Transportation, CP 42.

to solve the pipe connection problem. When Mr. Libera's lender sent a representative to look at the problem with Mr. Libera, Mr. Libera discovered that the end of the old pipeline, which he paid to have cleaned out, was buried again. This was caused by the City's installation of a new utility pole. Plaintiff continued his attempts to get city officials to visit his property to review the drainage problem. On April 3, 2008, Plaintiff received a letter from Roger Vess regarding catch basin connections. There was no mention in this letter regarding how to remove water from Mr. Libera's business entrance, despite Mr. Libera's efforts to make sure the water would drain.

During an onsite meeting with Mr. Vess and Dan Morrison, Mr. Libera again offered to install City's connection at his own expense, but this offer was rejected by Mr. Vess. Following Mr. Libera's meeting with Dennis Dixon, City Attorney, on or around July 18, 2008 a city crew visited the Property and flushed Mr. Libera's catch basin when he was not present. When Mr. Libera arrived after the crew left, he found that the pipe end was still buried and the water had pooled.

Mr. Dixon said that Public Works agreed there was a blockage on the City's end of the system and would develop a plan to fix the blockage. The City did not actually install the drain and complete its portion of the project until December 2008. By this time, one of Mr. Libera's lenders

had withdrawn its financing due to the Property development delays and one lender went out of business. Mr. Libera went from two lenders on a million dollar project to none at all, with no new lenders available at that time.

Two years later, in 2010, the City finally approached Mr. Libera with a proposal regarding the remaining paving and development requirements: the City would have allowed Mr. Libera to proceed with opening his business prior to paving as long as the paving was completed within a year. An agreement between Mr. Libera and the City was finalized in October 2010. CP 44. Plaintiff proceeded to dedicate more financing and time toward making his business operational. The City's Public Works Department continued to delay the process.

Ultimately, the City's water and power departments bypassed the approval of Roger Vess and Public Works (a tacit admission of wrongdoing) and connected Plaintiff's power and water services. As a result of the City's continual delay and the ongoing incompetence of their employee, Roger Vess, Mr. Libera defaulted on loans tied to his home and investment properties. Knowing that his business and livelihood were on the line, Plaintiff suffered much anxiety, stress and frustration due to the City's actions or lack of action during the 14 months leading up to the drainage problem resolution. As a result of this stress from his loss of

income, investments, business, and efforts to obtain financing to save his business, Plaintiff continues to suffer emotional distress.

III. ARGUMENT IN REPLY

(A) Standard of Review

The parties agree that the court reviews a summary judgment ruling de novo. Br. of Appellants at 11; Br. of Rsp'ts at 12. Dismissal here was therefore inappropriate where it is beyond doubt that Mr. Libera proved facts to justify his recovery.

(B) Statute of Limitations

The *Blume* and *Westmark* cases are directly on point for the present case, and the City hopes the court will disregard case precedent as it applies to the facts of the present case. Mr. Libera's arguments in his opening brief remain salient in response to the attempted analysis by the City. In *Blume*, the Plaintiffs filed their case after over five years of delay by the City of Seattle in attempting to obtain a permit for a building project in the University District. *City of Seattle v. Blume*, 947 P.2d 223 at 249. Even though the injuries presumably began to occur one year after the permit application was submitted (the average time for permitting approval at the time was six to nine months), the court found that the suit was filed within the three-year statute of limitations period, even though

the actions of the city and resulting damages were continuous and ongoing. *Id.* at 250-51.

The Blumes applied for an office park development permit in February of 1987. As of June 1992, the City of Seattle still had not made a decision on their permit application, and ultimately the Blumes withdrew their application in June of 1992. A series of actions took place during those five years, and any one of those actions could have been used as the beginning of the tolling of the statute of limitations, under the theory proffered by the City of Port Angeles. But the court in *Blume* allowed the claim of tortious interference with business expectancy to go forward based on the delay that occurred due to the City of Seattle's acts and omissions, *not* based on one single incident that occurred at one single point in time. *Id.* at 251.

In fact, because of the nature of delay, it is incongruous to argue that only one initial incident of harm can be used to show the injury that accrued for purposes of pinpointing a starting date for the statute of limitations to begin running. Delay, by its nature, occurs over an extended period of time, and is not simply one incident that causes the injury. The delay in itself is the injury, which can happen over several years. In many instances, and certainly a common theme running through

the caselaw, it is the unreasonable delay in itself that is the cause of the injury.

Improper delay is a common theme running through *Pleas*, *Blume* and *Westmark*. *Pleas (Pleas v. Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989)), *Blume (City of Seattle v. Blume*, 947 P.2d 223, 134 Wn.2d 243 (1997)), *Westmark* (*Westmark Development Corp. v. City of Burien*, 140 Wn.App. 540, (Wash.App. Div. 1 2007) 166 P.3d 813, *review denied*). The courts have found defendants liable for tortious interference with business expectancy when there has been improper delay by the defendant, which causes harm to the Plaintiff's business, and such improper delay can be probative of the element of "improper means."

In *Westmark*, a SEPA (State Environmental Protection Act) expert testified that he had never experienced a situation where it took three years to complete a SEPA review and that the review in that case was the longest, most frustrating delayed process in the history of his career. *Westmark*, 140 Wn.App. at 560-61. The basis of the expert's frustration was that Burien would not respond to Westmark's inquiries about the sufficiency of the environmental information provided, and that Westmark would ask what specific issues needed to be addressed and Burien would not give straight answers. *Id.* The court in *Westmark* looked to the *Pleas* case and found that the facts in *Pleas* involving

improper delay were sufficiently analogous to the facts in *Westmark*, and that improper delay supports the element of "improper purpose" in a claim of tortious interference with business expectancy, and the *Westmark* court affirmed the jury's award of damages to Westmark Development Corp.

In *Blume*, the court found that the City of Seattle's delay in the permitting process was a basis for the tortious interference claim. *Blume*, 134 Wn.2d. at 251. The Blumes applied for an office park development permit in February of 1987. As of June 1992, the City of Seattle still had not made a decision on their permit application, and ultimately the Blumes withdrew their application in June of 1992. A series of actions took place during those five years. The court in *Blume* allowed the claim of tortious interference with business expectancy to go forward based on the delay that occurred due to the City of Seattle's acts and omissions. *Id.* at 251.

Delay is clearly the cause of the injury that occurred in the case at bar. The City was aware of the faulty drainage system as far back as 1984. Mr. Libera began work in earnest on his operations in 2007 and was in continual communication with the City regarding correcting and repairing the drainage system from 2007 through 2010, a period of approximately four years. The City's argument that Mr. Libera waited

until 2007 to begin work on the project is a specious argument, and does not absolve them of their duties under the law. The City's actions and failure to act during that time period constitute unreasonable delay and the delay was the proximate cause of Mr. Libera's injuries, which led to the damages demonstrated in the case below.

(C) Defendant's LUPA analysis

The City attempts to construe the facts to shoehorn them into its theory that Mr. Libera should have filed a Land Use Petition Act (LUPA) petition. It should be noted that Mr. Libera is not appealing the summary judgment dismissal of claims other than the tortious interference with business expectancy claim. LUPA applies to regulatory decisions, as the City admits, and Mr. Libera is only appealing the tortious interference with business expectancy claims. The facts in this case parallel many of the facts in the cases in Washington construing the common law claim of tortious interference.

The City cites the LUPA statute that defines land use decisions as (paraphrasing) an application for a project permit required by law before real property may be improved; an interpretive decision regarding the application to a specific property of zoning or other ordinances regulating the improvement of real property; and the enforcement by a local jurisdiction of ordinances regulating the improvement, development,

modification, maintenance or use of real property. The tort of interference with business expectancy is especially on point here because the City did issue Mr. Libera a permit, but then thwarted his ability to move forward with that development for which he was permitted.

(D) The Elements of a Tortious Interference Claim

A claim for tortious interference with a contractual relationship or business expectancy requires five elements: (1) the existence of a valid contractual relationship; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *Leingang v. Pierce County. Medical Bureau,* 131 Wash.2d 133, 157, 930 P.2d 288 (1997), cited by *Westmark Development Corp. v. City of Burien*, 140 Wn.App. 540, 557 (Wash.App. Div. 1 2007) 166 P.3d 813, 822. Once Plaintiff establishes these elements, defendant has the burden of justifying the interference or demonstrating that his actions were privileged. *Pleas v. Seattle*, 112 Wn.2d 794, 800, 804, 774 P.2d 1158 (1989). "A cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Id.* at 803-04.

"Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Newton Insurance Agency and Brokerage, Inc. v. Caledonian Insurance Group, Inc.* 114 Wn.App. 151, 158, 52 P.3d 30 (2002).

Mr. Libera already demonstrated that all of these elements have been met in his opening brief, and the City attempts to cherry-pick which elements it chooses to analyze, without a complete analysis of all the elements. "A cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Pleas v. Seattle*, 112 Wn.2d 794, 800, 803-804, 774 P.2d 1158 (1989). "Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Newton Insurance Agency and Brokerage, Inc. v. Caledonian Insurance Group, Inc.* 114 Wn.App. 151, 158, 52 P.3d 30 (2002).

There is ample evidence that Mr. Libera had valid existing contractual relationships with construction professionals as well as financing companies, and that the defendants were well aware of these relationships. Roger Vess made a site visit and/or inspection when Dan

Morrison, an excavation contractor, was present and Mr. Vess knew that Mr. Morrison was present at the site as a contractor who had been hired by Mr. Libera (CP 69). Mr. Libera also had contractual relationships for financing with WADOT Capital, of which the City was aware. WADOT was extending credit to Mr. Libera to finance the start-up of the business.

Second, the City intentionally interfered with Mr. Libera's business expectation by improper means by failing to repair and correct the structure of this drainage system, and continually delaying the repair at least as late as 2010, delaying the approval process for so long that Mr. Libera's investors withdrew their financing, and intentionally insisting that Mr. Libera perform duties that were the responsibility of the City. The City was well aware of the fact that Mr. Libera's water and sewer system would need to be connected to the City's system to be functional. The City was on notice as far back as 1984 that there were drainage problems on Mr. Libera's property that were attributable to the City. An old drainage system causing water pooling at the intersection of Fairmount Avenue and S.R. 101 was due to an arc haic clay tile structure that was installed by the City. Mr. Libera again reminded the City in 1988 that the drainage problem needed to be fixed before he could prepare to open his business.

Yet again, beginning at least as early as 2007, Mr. Libera communicated many times with the City requesting the installation of a functional drain line to draw water away from the Property to prevent storm system back-up problems. While the City responded to Mr. Libera with a letter in January 2008 (CP 37), the letter made no mention of how the City planned to repair their archaic drainage system that was impacting Mr. Libera's property. This letter requested that Gene Unger, Mr. Libera's contracted engineer, submit stormwater design and calculations to meet the updated 2005 Storm Water Management Manual requirements and on March 6, 2008, Mr. Unger sent the revised drainage plan and calculations to Stephen Sperr, then the City Engineer. (CP 55-56).

Sometime in March 2008, Mr. Vess told Mr. Libera to continue with the paving and that in a few months the City would remove the pavement and fix the drain problem. This is an admission that there was a problem with the drainage. However, this would have required Mr. Libera to spend approximately $22,000.00 to perform the paving, only to have the pavement torn up several months later, an unreasonable demand to be made of Mr. Libera by the City. The old system is only five inches deep, but the Washington State Department of Transportation (WSDOT) "Standard Specifications for Road, Bridge, and Municipal Construction,"

requires that parking lot catch basins must be at least 18 inches deep. (CP 58-59). It is unreasonable of the City to expect that Mr. Libera's contractor would complete Mr. Libera's paving and portion of the storm drain and connect to the City's segment until the City's segment was unblocked, operational, and complied with the WSDOT standards and specifications.

To make matters worse, Mr. Libera even offered to replace the archaic part of the stormwater system with a modern system at his own expense, but the City, represented by Roger Vess, denied his request. Incredibly, the City installed a new utility pole around this time, and the installation of the pole buried the end of the old pipeline, which Mr. Libera had just paid a contractor to clean. This intentionally tortious behavior by the City continued to cause damage to Mr. Libera's ability to open his business on the property. The communications from and actions by the City became so unreasonable and unfathomable, that Mr. Libera determined it was in his best interest to hire a lawyer, Gerald Steel, to assist with negotiating the drainage problems with the City regarding the ongoing blockage of the sewer line.

IV. CONCLUSION

In short, the City attempts to draw LUPA into the case, when LUPA does not apply to the facts of the case. Mr. Libera had the

expectancy that he would be able to move forward with developing the property in the manner allowed by his permit, and relied on the expectation that the City would not thwart his attempts to develop his oil recycling business. The City, primarily through Roger Vess, and the Departments' ratification of Mr. Vess' actions, fatally prohibited Mr. Libera from successfully opening his oil recycling business in contravention of the law.

Presented and signed this 8th day of February, 2013, by:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 8, 2013, I served the attached document using legal messenger to the Division 1 Court of Appeals, and the counsel listed below:

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